



**Trailink Group Limited v Kenya Long Distance Truck Drivers & Allied Workers Union
(Civil Application 384 of 2021) [2021] KECA 159 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 159 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 384 OF 2021
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
NOVEMBER 19, 2021**

BETWEEN

TRAILINK GROUP LIMITED APPLICANT

AND

**KENYA LONG DISTANCE TRUCK DRIVERS & ALLIED WORKERS
UNION RESPONDENT**

*(Being an application for Stay of Execution of the Employment and
Labour Relations Court in Nairobi (Maureen Onyango, J) from the
Ruling dated 8th October 2021 in ELRC Cause No. 2181 of 2014)*

RULING

1. By a Notice of Motion dated 4th November 2021, the Applicant, Trailing Group Limited, prays that, pending the hearing and determination of Civil Appeal Nos. 88 of 2018, 589 of 2019 and E244 of 2021, this Court do –
 - (a) spent;
 - (b) stay execution of the Judgment and Decree in ELRC Cause No. 2181 of 2014 (Matthews Nduma, J.) given on 26th May 2017;
 - (c) stay further execution proceedings in, and arising from, the Judgment and Decree in ELRC Cause No. 2181 of 2014 (Matthews Nduma, J.) given on 26th May 2017;
 - (d) stay execution of the Rulings and Orders given in ELRC Cause No. 2181 of 2014 (Maureen Onyango, J) on 20th December 2019 and 8th October 2021;



- (e) order and direct the respondent and Icon Auctioneers to release all the trucks and trailers proclaimed pursuant to the proclamation notice dated 26th October 2021;
 - (f) order and direct that the auctioneer's costs incurred in the execution proceedings be borne by the Respondent; and
 - (g) order and direct that the Costs of this application be provided for.
2. The applicant's Motion is supported by the annexed affidavit of Peter Njenga, the applicant's Human Resource Manager, sworn on 4th November 2021. We hasten to observe that the Orders given in ELRC Cause No. 2181 of 2014 (Maureen Onyango, J.) on 8th October 2021 were negative orders dismissing the applicant's application for temporary stay of her orders. Accordingly, the dismissal order given on 8th October 2021 is incapable of being stayed as prayed.
3. The respondent opposes the applicant's Motion on several grounds set out in the replying affidavit of Nicholas Mbugua (the Respondent's Secretary-General) sworn on. 15th November 2021, praying that the application be dismissed with costs to the Respondent. According to Nicholas Mbugua –
- (a) by its Motion, the applicant is “forum shopping”;
 - (b) the applicant has filed three appeals relating to this dispute, and which are pending in this Court;
 - (c) this application is an abuse of the court process;
 - (d) the applicant has no right to be heard in view of the fact that it is in breach of the terms of the conditional stay granted on 24th November 2017 by Nduma, J; and
 - (e) the present application for stay of execution and further proceedings pending appeal is intended to deny the Respondent the fruits of its judgment.
3. The applicant's Motion, which is made pursuant to Rule 5(2) (b) of the Court of Appeal Rules succeeds or fails on the two-fold test as to whether the applicant has an arguable appeal; and (b) whether its appeal would be rendered nugatory if stay is not granted as sought. In its Memorandum of Appeal, the applicant advances 7 grounds, which we take the liberty to reframe below. According to the applicant, the learned Judge erred in –
- (a) directing the Deputy Registrar to assess the quantum of monetary award payable to the grievants;
 - (b) Failing to appreciate that, once Judgment was delivered in final determination of the cause, the Court became functus officio and, consequently, the Deputy Registrar had no jurisdiction to do what the trial court had ordered;
 - (c) failing to appreciate that the impugned Judgment was, and still is, the subject of Civil Appeal No. 88 of 2018, and that further proceedings ought not to have been undertaken before final determination of the appeal;
 - (d) failing to appreciate that the impugned Ruling and Order denied the applicant the right to be heard in a pending reference to taxation application dated 27th August 2020;



- (e) failing to appreciate that the legal effect of her impugned ruling amounted to either rewriting or varying the Judgment of Nduma, J. delivered on 26th May 2017;
- (f) failing to appreciate that the legal effect of admitting into the proceedings 140 unknown persons, and including them in her ruling, after the delivery of judgment, amounted to a new cause of action, was illegal, irregular and unconstitutional; and
- (g) failing to appreciate that the none-participation of the applicant in the application for stay of execution of the warrants of attachment issued by the Deputy Registrar, was justified on account of a pending hearing and determination of an application for recusal of the learned Judge from the cause.

5. In our considered view, the grounds on which the applicant's appeal is preferred are not merely idle. We are persuaded that the applicant has an arguable appeal with the possibility of success. That satisfies the first limb of the two-fold test. The remaining question is whether the appeal would be rendered nugatory should we decline to grant stay of the Ruling and order aforesaid. It would be. Execution of the decree for the recovery of the decretal sum allegedly amounting to KShs. 32,616,329 (inclusive of accrued interest), and payment thereof to the 140 grievants claiming under the respondent would render the appeal nugatory. This is more so in light of the appellant's claim that the 140 decree holders are unknown to the applicant, having been introduced into the proceedings too late in the day without participating in the proceedings from which the decree sought to be executed arose. We are satisfied that the events leading to the Ruling, order and decree sought to be executed justify conditional stay of execution pending hearing and determination of the three appeals which in our considered view, should be consolidated as they relate to the same cause of action between the same parties.

6. Having carefully considered the appellant's Notice of Motion dated 4th November 2021, the affidavit in support thereof and the respondent's replying affidavit, the written submissions of learned counsel for the applicant together with the accompanying list and digest of cases dated 9th November 2021, the written submissions of learned counsel for the respondent dated 15th November 2021 together with their undated list of authorities, and having heard learned counsel for the applicant and learned counsel for the respondent, we HEREBY ORDER AND DIRECT THAT –

- (a) there be stay of execution of the Judgment and Decree given on 26th May 2017 in ELRC Cause No. 2181 of 2014 (Matthews Nduma, J.);
- (b) there be stay of further execution proceedings relating to the Judgment and Decree given on 26th May 2017 in ELRC Cause No. 2181 of 2014 (Matthews Nduma, J.);
- (c) there be stay of execution of the Ruling and Order given on 20th December 2019 in ELRC Cause No. 2181 of 2014 (Maureen Onyango, J.);
- (d) the orders for stay granted in (a), (b) and (c) above are conditional to the applicant depositing a sum of KShs. 21,000,000 in an interest earning account in a reputable bank as security to be held between learned counsel for the applicant and learned counsel for the respondent within thirty days from the date hereof and, in any event, not later than 18th December 2021, failing which the orders for stay given herein shall automatically lapse;



- (e) in lieu of deposit, the applicant do furnish to the respondent a bank guarantee as security on the terms specified in (d) above;
- (f) upon full compliance with the orders given in (d) and (e) above, the respondent and Icon Auctioneers do release all the applicant's trucks and trailers proclaimed pursuant to the proclamation notice dated 26th October 2021;
- (g) the auctioneers' costs incurred in the execution proceedings aforesaid be borne by the applicant;
- (h) Civil Appeal Numbers 88 of 2018 and 589 of 2019 be consolidated for hearing and determination together with this appeal; and
- (i) the Costs of this application be in the appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

